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Slotte, Pamela Paulina

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Chapter 10

"Rights, Not Charity!" On Vocabularies for Conceptualizing the Case of Persons with Disabilities

Pamela Slotte

Introduction

A recent manual by the Maltese National Commission of Persons with Disabilities, co-financed by the European Union for the Year of Equal Opportunities for All 2007, is entitled *Rights, not charity*.[1] The authors of the manual do not consider charity in itself to be wrong.

[1] National Commission Persons with Disability, *Rights, not charity: Guidelines towards an inclusive society and a positive difference in the lives of Maltese and Gozitan disabled people* (Sta Venera: 2007). The commission, later renamed the *Commission for the Rights of Persons with Disability,* works for the full inclusion of disabled persons in Maltese society. Apart from promotional work, assistance and education, it seeks to counteract discrimination through litigation. See European Network of Equality Bodies, *Commission for the Rights of Persons with Disability*, URL: http://equineteurope.org/author/malta_ncpd/ [accessed 2.7.2019]. For the prehistory and elaboration of CRPD, see Arlene S. Kanter, *The Development of Disability Rights under International Law: From Charity to Rights* (Abingdon: 2015), 21-53. This chapter has been written as part of the author's academy research fellow project 'Management of the Sacred: A Critical Inquiry', funded by the Academy of Finland 2013-2018 (grant number: 265887) and work as vice-director of the

However, the authors make a point from the very fact that what they call for are 'rights'. The preface of the manual states that the word 'rights' "refers to the sense of equality among us, with a much wider meaning now that even the United Nations has adopted the Convention on the Rights of Persons with Disabilities" (CRPD).[2] The authors see the outcome very

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Centre of Excellence in Law, Identity and the European Narratives, Academy of Finland 2018-2025 (grant number: 312430).

[2] National Commission Persons with Disability, *Rights, not charity*, 6. There exists no consensus regarding terminology and, e.g., whether it is more appropriate to speak of 'people/persons with disabilities' or 'disabled people/persons'. The former terminology is criticized for neglecting how external social factors contribute to the creation of 'disability', while the latter is criticized for overlooking the fact that disability only forms one aspect of a person's identity. This essay uses the terms 'disabled people/persons' and 'people/persons with disabilities' interchangeably. Another important distinction in this context is the one advocates for a so-called social model of disability make between individual (physical or mental) 'impairment', which is 'medical', and 'disability', which is 'social' and can be changed through political action. For a short discussion of these terminological issues, see Lisa Schur, Douglas Kruse, and Peter Blanck, *People with Disabilities: Sidelined or Mainstreamed?* (Cambridge, Eng.: 2013), 6-8. See also ibid., 8-13, for a discussion of different ways to understand disability: medical, social, and so-called universalist models. This last model does not distinguish between disabled and non-disabled persons but finds that during one's lifetime everyone will at some point experience some form of limitation and (individual medical) impairment. As we shall see, this understanding of human life is clearly embraced by Martha Nussbaum. She combines social and universalist models

differently, depending on the strategy adopted to tackle the problems facing persons with disabilities. Importantly, the so-called 'disability sector' must not be associated exclusively with charity and voluntary work: "The disability sector is at crossroads. One leads towards continued segregation, the other towards inclusion. Each leads to a different destination. Segregation leads to charity, whilst inclusion stresses rights. As a community we must choose our destination - rights or charity? This manual should put us on the right track."[3]

When support is needed so as to achieve inclusion, "[t]his support should not be considered as charity or preferential treatment, but as a tool to realise their [disabled people] human rights and also as an essential element to create social justice".[4] The terminology frames the person with disabilities as someone worthy of respect and full participation, as in the case of rights, or as someone 'pitiable' and in need of aid and assistance, as in the case of charity.[5] Similar points have also been made elsewhere.[6] In academic research, such as research into prosocial behavior, altruism[7] or the non-profit sector, the concept of charity is neither used nor necessarily even tolerated. Partly it has actually become an outright taboo, given its strong historical baggage and the way it seemingly cements (unequal) strong

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of disability in her writings. See e.g., Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, MA: 2006), 99-101.

[3] National Commission Persons with Disability, *Rights, not charity*, 13 and 19.

[4] Ibid., 23.

[5] Ibid., 17.

[6] See e.g. Kanter, *The Development of Disability Rights under International Law*, 46 and 291.

[7] Kristen Renwick Monroe, *The Heart of Altruism: Perceptions of a Common Humanity* (Princeton, NJ: 1996).

configurations of power. For instance, the concept is encumbered in English. It has been replaced, for example, by the concepts of respect,[8] empowerment, "doing together", or "community-social work".[9] On the other hand, job offers in the field of human rights are still often classified as jobs in the charity sector, at least in the United Kingdom.[10] Human rights work is nonprofit work, aimed not at increasing the prosperity of shareholders, but at meeting the needs and achieving a decent standard of living for everyone independent of race, sex, nationality, religion and so forth.

Thus, general discussions simultaneously connect charity and (human) rights, and play them off each other. Charity and human rights are vocabularies for self-identification: I am a rights-holder; you have obligations towards me! I am a human rights worker and not in this for the money; I hold other (higher) ideals. Yet they are not synonymous, as the reference to the idea of 'equality' makes clear. Moreover, the 'indisputable' moral quality of charity is questioned, as is its viability for addressing asymmetrical power relations and patterns of exclusion.

This essay explores the supposed usefulness of human 'rights' vocabulary – as opposed to 'charity' – for addressing matters of concern to persons who in various ways are marginalized. By this, it puts a contemporary twist on themes recurrent in this collected volume: 'rights' and 'needs', as well as 'charity' and the politics of rights. It does this by presenting and to some extent juxtaposing the writings of two contemporary theorists, Martha Nussbaum and James W. Nickel. While not each other's complete opposites, in certain

[8] Richard Sennett, *Respect in a World of Inequality* (New York: 2003).

[9] Anne Birgitta Pessi, E-mail correspondence, 13.1.2015. On file with the author.

[10] See e.g. CharityJob, *Human Rights jobs*, URL: www.charityjob.co.uk/jobs/human+rights [accessed 2.7.2019].

respects they will stand as representatives for two ways in which contemporary literature deals with human rights from a more philosophical point of view, and attempts to grasp the character of human rights, their 'usefulness' and their supra-positive basis. They emphasize differently the importance of 'rights' language, while simultaneously both exposing a more bottom-up kind of reasoning via an explicit critique of (to their mind) more standard, so-called top-down reasoning.[11] The essay will consider the utility of these approaches for making a case for those on the margins by focusing, to some extent, on the case of disabled persons. Despite the many promising developments in recent years, disabled people suffer widespread economic, political and social exclusion, and intersectional discrimination (i.e. discrimination on a combination of two or more grounds, for example, on the basis of

[11] A top-down approach starts with an organizing principle in the form of "an overarching principle, or principles, or an authoritative decision procedure … from which human rights can then be derived". The bottom-up approach, in turn, commences with "human rights as used in our actual social life … [and] then sees what higher principles one must resort to in order to explain the moral weight of such claims - when one thinks that it exists - and to then resolve any possible conflicts between them". James Griffin, *On Human Rights* (Oxford: 2008), 29. Yet another group of modern philosophers elaborates a connection by putting forward primarily structural accounts of human rights. See e.g. Pamela Slotte, *Human Rights, Morality, and Religion: On Human Rigths as a Moral and Legal Concept in a Pluralistic World* [Mänskliga rättigheter, moral och religion: Om de mänskliga rättigheterna som moraliskt och juridiskt begrepp i en pluralistisk värld], Doctoral dissertation (Turku: 2005), c. 2.1.3 and 2.3.2.

disability and gender) is a serious problem.[12] It also is a significant concern since they, by some accounts, are "a large, if not the largest, growing minority in the world".[13]

The essay ends up suggesting that while recognizing the benefits of particular vocabularies, we also need to stay aware of the limits of any vocabulary that seeks to tend to so-called vulnerable groups, in this case persons with disabilities. This means that rights-language cannot completely replace other ways of portraying/explaining and addressing human life in all its multifacetedness.[14] Other vocabularies, including the vocabulary of charity, might still play some role when we seek to conceptualize the position of marginalized groups.

Nickel on the Limits of 'Charity'

Contemporary human rights documents rarely refer to philosophical foundations. Rights are also not seen as faith-based. This is a conscious choice which resonates in much human rights discourse; rights can travel further without explicit ideological baggage of this kind. Even so,

[12] Schur, Kruse and Blanck, *People with Disabilities*, 194-203 and 208.

[13] Kanter, *The Development of Disability Rights under International Law*, 29.

[14] In a related fashion, Anthony Woodiwiss talks of "the double-edged character of human rights discourse – double-edged in the sense that something was lost as well as given with the arrival of rights". Anthony Woodiwiss, "The Law Cannot Be Enough: Human Rights and the Limits of Legalism," in *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law*, ed. Saladin Meckled-García and Başak Çali (London: 2006), 32-48, 36.

many do point out that contemporary human rights are, in fact, a highly ideological project,[15] and some would even say 'inherently' religious as to their ultimate foundations.[16]

In the following, two attempts are studied which seek to formulate an understanding of what we are dealing with and to capture the relevance of what is talked about and demanded in the name of (human) rights. The two positions seek to do this without necessarily entering into a very extensive discussion in explicitly 'moral terms'. Still, they do presuppose that we are dealing with a normativity that is legally independent.[17] Moreover, they oppose what they take as standard philosophical ways to found human rights in *one* idea – for example, human 'autonomy' or 'utility'. They consider this a reductionist and excluding approach[18] even

[15] See e.g. Martti Koskenniemi, "The Effect of Rights on Political Culture," in *The European Union and Human Rights*, ed. Philip Alston (Oxford: 1999), 99-116; Martti Koskenniemi, *The Politics of International Law* (Oxford: 2011); David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, NJ: 2004).

[16] See e.g. Michael J. Perry, *The Idea of Human Rights: Four Inquiries* (New York: 1998), 13. For a discussion of this standpoint, see Ari Cohen, "The Problem of Secular Sacredness: Ronald Dworkin, Michael Perry, and Human Rights Foundationalism," *Journal of Human Rights* 5 (2006), 235-56.

[17] As Nickel repeatedly states, today's human rights are to a large extent the rights of lawyers, not the rights of philosophers. With this, he wishes to underline what today's discussion, his own included, largely has as its focus. James W. Nickel, *Making Sense of Human Rights*, 2nd ed. (Malden, MA: 2007), 7.

[18] Nickel, *Making Sense of Human Rights*, 54 and 103.

though, as we will see, Nussbaum to a great extent takes the idea of human dignity as her ultimate normative point of departure.

In contrast, in his *Making Sense of Human Rights*, Nickel does not want to settle for simply one kind of legitimation of human rights. Many reasons can be put forward, reasons that have their advantages and disadvantages. They may be "prudential arguments" related to the possibility of leading a good life, "utilitarian and pragmatic justifications" or "arguments from plausible moral norms and values, including fairness, dignity, minimal well-being, security, and liberty". Nickel himself leans in a specific non-consequentialist direction here,[19] yet what he wishes to underline in particular is the usefulness of human rights in themselves, and in his view the more reasons and grounds that can be provided for them, the more stable they will be.

In his book, Nickel contrasts 'charity' and human rights in order to make a point regarding exactly what the *character* is of the claims that we are dealing with here. What we seek to capture in human rights terminology are recurrent serious threats to what is of the highest priority to human life everywhere in the world. From this it also follows that we assume that the morally central is of such a nature that norms of particular weight are required to safeguard it: norms in the form of rights. Another way to formulate the norm in question could be to identify certain 'goals', or, as Nickel puts it, "a duty of charity". "Conceivably a society could rely on collective aspirations or goals, together with feelings of love and solidarity, to ensure that all people enjoy minimally good lives."[20]

According to Nickel, in order to identify something as a human right, we need to show that this alternative "weaker" terminology is not enough when it comes to protecting

[19] Ibid., 53-54 and 61.

[20] Ibid., 75.

particular aspects of human life, and that it must be replaced by specific legal rights that specify who has a duty to respect and protect them and in what way. Legal rights raise binding and "fairly definite" claims against certain actors. Furthermore, it is usually evident how one can go about securing the rights, when this is needed.[21]

Here resides the attractiveness of rights. A 'human right' signals that we are dealing with something of the highest priority. In addition, a human right can be associated with a particular person. A right demands that every individual should enjoy something: it is of "mandatory character". Instead, a goal, for example, can be connected to the idea that what we need to pursue is what is good for the highest possible number of people. In theory, the needs of the individual can be disregarded. While not 'absolute', and also at times formulated in very abstract terms, a right leaves less room for discretion than a goal. To get one's claim acknowledged as a human right lends it legitimacy and will strengthen its cause.[22]

In contrast to this, "duties of charity" leave it up to the donor to decide when, what and how much he or she is willing to give. According to Nickel, these duties do not correlate with rights. The result can potentially be that support fluctuates and is irregular, as well as "spotty". For, as pointed out by John Stuart Mill, to whom Nickel here refers: "Charity almost always does too much or too little: it lavishes its bounty in one place, and leaves people to starve in another".[23] Fair enough: formal 'charity' institutions with secure long-

[21] Ibid., 75-76.

[22] Ibid., 25-26 and 96.

[23] Ibid., 77 and 147-48, quoting John Stuart Mill, *Principles of Political Economy with some of their Applications to Social Philosophy* (London: 1881). See also e.g. Griffin, *On Human Rights*, 96.

term funding may be able to meet the needs of larger groups of people. However, Nickel maintains that legal norms may still be necessary so as to secure access to support:[24]

> A harmonious combination of self-help and voluntary mutual assistance is certainly to be encouraged, but such a mixture offers little prospect of providing adequately for all of the needy and incapacitated if it is viewed as a substitute for, rather than as a supplement to, politically implemented social rights.[25]

In relation to the introduction of this essay, Nickel thus assumes that rights empower people in a different way than is the case when they are the recipients of duties of charity. The authors of the Maltese manual on human rights make similar points, stressing how rights place the focus on duties, the role of public authorities, the quality of the life and its continuity.[26] Compared to the uses of charity encountered in earlier chapters in this volume, 'charity' stands forth as supererogatory and perfectly voluntary to the positions accounted for thus far in this essay.[27]

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[24] Nickel, *Making Sense of Human Rights*, 77.

[25] Ibid., 147.

[26] Ibid., 17 and 19.

[27] What is more, it is possible to question a clear-cut juxtaposition of 'rights' and 'charity'. See e.g. Jean-Luc Nancy, who views "philanthropy" as "a secular displacement of the ostensibly all-too-Christian charity" and maintains that: "For whatever the term is used, human rights are marked by a certain degree of philanthropy mixed with a promise of 'social progress', which is always linked to a 'larger freedom'." Jean-Luc Nancy, "On Human Rights: Two Simple Remarks," in *The Meaning of Rights: The Philosophy and Social Theory of Human Rights*, ed. Costas Douzinas and Conor Gearty (Cambridge: 2014), 15-20, 15-16.

Moral Rights

So, what concretely are we dealing with when 'charity' proves inadequate as a vocabulary? Nickel represents a position that connects to the talk about natural rights in earlier centuries, although today's human rights differ from their historical, and particularly eighteenth-century, counterparts by being "more egalitarian, less individualistic, and more internationally oriented".[28] The concept of rights plays a key role and representatives of this position express themselves in a terminology that connects with a legal conceptuality. One talks of moral rights, and the discussion to a large extent relies on the insights of Wesley Newcomb Hohfeld with regard to the concept of 'a right'. Simultaneously, the discussion is broadened beyond Hohfeld.[29] Alejandra Mancilla's essay in this volume offers an example of this use of terminology.

It is not that moral rights exist as freestanding parts of the natural world. Yet, by means of this terminology Nickel and others[30] wish to capture the extra-legal reality that forms the 'seed' of legal rights. Here, they seek a place for the talk of human rights in relation to the moral convictions that one identifies in the extra-legal sphere. They seemingly want to refute

[28] Ibid., 12-14.

[29] Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning, and Other Legal Essays*, ed. Walter W. Cook (New Haven: 1920). See also e.g. Nickel, *Making Sense of Human Rights*, 23; Slotte, *Human Rights, Morality, and Religion*, 37-44.

[30] See e.g. Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton, NJ: 1996); Charles Jones, *Global Justice: Defending Cosmopolitanism* (Oxford: 2001).

a morally exclusive stance, as they do not want to mistake human rights for an actual (comprehensive) morality. If nothing else, this would undermine their claim to universality.

Nickel deals with this challenge by formulating criteria on the basis of which moral 'rights' can be distinguished from other value conceptions. Not all human needs or goods are identified as human rights. Some claims carry more weight than others and may justifiably be called rights: namely, people's moral claims that their lives in certain respects should attain at least a minimum standard of a decent life. Nickel distinguishes between a good and a decent life:[31] it is not about raising claims regarding what could be seen as valuable to a good life in general, but about certain fundamental human interests. (He also thinks that the claims can find support from within several meta-ethical theories.[32])

According to Nickel, people's moral claims must be safeguarded in four areas. These are: "a secure claim to have a life" and "to lead one's life", as well as "a secure claim against severely cruel or degrading treatment", and "against severely unfair treatment". These four abstract rights with their associated duties are 'secure' in the sense that they do not have to be "earned", and also "in the sense that their availability to a person does not depend on the person's ability to generate utility or other good consequences".[33] Nickel's idea is that if they are guaranteed, people will be able to lead a life that is reasonable and in a minimal sense "good". It is a "substantial but limited commitment to equality" which carries with it both

[31] Nickel, *Making Sense of Human Rights*, 75. Nussbaum, for her part, combines the two elements: needs and human dignity. Michael Freeman, *Human Rights: An Interdisciplinary Approach* (Cambridge, Eng.: 2002), 65.

[32] Nickel, *Making Sense of Human Rights*, 67.

[33] Ibid., 62.

"negative" and "positive" duties. In an abstract sense, these duties fall on everyone;[34] yet, to the extent that they are legally binding, their claims against governments are *de facto* higher. For Nickel, human rights are first and foremost political norms and not "interpersonal standards".[35]

Nickel translates these abstract claims (or foundational principles), which he sees as "requirements of human dignity", into human rights terminology.[36] Human rights expand on and seek to guarantee various aspects of these claims. They also qualify them, taking into account, for example, the comparable needs of other human beings. Moreover, in order to be able to conclude that specific human rights are indeed justified, they have to be put to a further test in six steps. Nickel actually assumes that this test is independent of the "starting points" that people may have for justifying human rights in the first place: including then, in effect, also his own four proposed 'secure claims'.[37] As noted, he does want to keep ultimate justifications open. I will return to the test in a bit, but first: how should we understand these moral *rights*?

Theorists disagree as to when (in the process that will result in a legal (human) right) it is *correct* to talk of something as a *right*. Nickel, for his part, finds that it is correct whenever we can identify and "justify on moral or legal grounds the proposition that people are entitled to enjoy specific goods", i.e. an entitlement, as well as identify an addressee, i.e. a holder of correlative "moral duties, disabilities, or liabilities". In the perhaps more familiar terminology

[34] Ibid., 62.

[35] Ibid., 10.

[36] Ibid., 66.

[37] Ibid., 75.

used, for example, by Joel Feinberg this amounts to a "claim-to" something and a "claim-against" someone.[38]

In general, Nickel identifies moral rights as those moral expressions that can be found in the actual morality embraced by one or several groups of people. These accepted conceptions of what is right and good can exist on a moral and social plane before and alongside the legal expression. Simultaneously, he identifies what he calls *justified* moral rights. In this way, he seeks to capture the fact that individuals can partly or completely distance themselves from the prevalent convictions in their own society and invoke different standards of right and good. Their justified morality might then be an amended version of the accepted morality, but a justified morality can also be "a philosophical reconstruction of morality".[39] Something can be right or wrong on other grounds than on account of its according with the generally accepted convictions in a particular cultural context. This makes sense, since the scope of their claim to validity make human rights unique as legal norms. Human rights do not claim to accord only with the convictions of a particular society. Nickel needs to talk of *justified* moral rights so as to be able to defend human rights, as we find them in international law, in a situation where it seems impossible to attain global agreement. "A justified morality is one that is well supported by appropriate reasons."[40]

Justifying Specific Human Rights

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[38] Ibid., 29-33. See also Joel Feinberg and Jan Narveson, "The Nature and Value of Rights," *Journal of Value Inquiry* 4 (1970), 243-60; Slotte, *Human Rights, Morality, and Religion*, 59-61. Cf. Griffin, *On Human Rights*, 107-10.

[39] Nickel, *Making Sense of Human Rights*, 28.

[40] Ibid., 46-47.

For Nickel, moral rights have a distinct structure that resembles the one ascribed to human rights in their legal form. A claim correlates with one or several duties. Accordingly, he assumes that the first three steps of the test for what can be justified human rights are: that the rights-holders must be human beings, governments have to be the primary addressees and that we must be dealing with matters of high priority.[41] However, he also argues that in order to be able to speak of a justified specific human right in one or another respect, we need to put the assertion to the following (and partly differently phrased) test in six steps:

> The justification of a specific human right requires satisfying six tests: (1) the norm responds to severe and widespread threats; (2) it protects something of great importance; (3) it can be formulated as a right of all people today; (4) a specific political right, rather than some weaker norm, is necessary to provide adequate protection against the threat; (5) the normative burdens imposed by the right are tolerable and can be equitably distributed; and (6) the special political right is feasible in an ample majority of countries.[42]

Hence,

> [j]ustifying a right to something requires more than merely showing the great importance of people's having access to a good. It also requires showing the

[41] Ibid., 75.

[42] Ibid., 90. Regarding human rights as responses to threats, see also e.g. Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, NY: 2003), 46, 58, 92, and 226; Shue, *Basic Rights*, 17 and 32-33; both of whom Nickel refers to in his discussion. Nickel, *Making Sense of Human Rights*, 71-73.

> availability of a feasible and morally acceptable way of imposing duties and constructing institutions that will make it possible to supply that good to all people.[43]

The last two steps in the test make clear that in order for a particular right to be justified, the duties accompanying it must be justified as well:

> The four secure claims ... both support and limit rights. They limit them by requiring that the normative burdens they impose on people not be ones that are destructive of life or health, that deprive people of fundamental freedoms, or that treat people in ways that are severely cruel or unfair.[44]

The last point concerns "feasibility": it must be possible to implement the right in question in the majority of today's countries (and even if this were not the case, it might still be that we are dealing with a right that justifiably can be considered a fundamental right in some countries). Moreover, even if a right fails the last test or ends up being only partly feasible, "it will be an international norm of considerable importance even though it is not (quite) a human right".[45]

Nickel seems to assume that in large part rights can be secured if citizens are obliged to pay a specific amount of tax. This would allocate the resources that are needed. It must not unreasonably burden single individuals, nor may it undermine the institutions in a country and economic productivity as such, which in the long run are necessary to secure general welfare as well as the rights themselves.[46] Thus, Nickel accepts that human rights are

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[43] Ibid., 186. For examples of how specific legal human rights can be justified on the basis of Nickel's model, see ibid., 106-67.

[44] Ibid., 78.

[45] Ibid., 78-79.

[46] Ibid., 68-69, 83, and 85.

interpreted partly in context (for example, in order to secure their acceptance) and that the standards of living can legitimately differ among countries. Furthermore, not all current legal human rights actually stand up to Nickel's test. While he finds that the rights enshrined in the Universal Declaration of Human Rights (UDHR) are mostly "normatively defensible",[47] he thinks that the document enumerates too many social rights, he himself preferring to limit the list of social rights to "subsistence, basic health care and basic education". These three pass his justificatory six-step test, including the test of feasibility, as even poorer countries can aspire to realize them.[48]

In sum, Nickel presents a reading of human rights that takes seriously the actual state of affairs when it comes to human rights in their legal form (most are, for example, not absolute and often enough they must be weighed against each other to some extent) and what is needed in terms of structures and institutions in order to implement them.[49] As seen above with regard to social rights, he pays attention to the differing political, social and cultural conditions in the world, and how these differences affect and partly must be allowed to affect the understanding and interpretation of human rights, as well as the extent to which, and how, they are guaranteed.

While he explains human rights in this way, Nickel simultaneously asserts that "justified moralities" are "the ultimate home of human rights".[50] Human rights do, in effect, exist as part of international law. More fundamentally, however: "[they] are norms that we have good reasons for retaining in or adding to existing moralities. Legal enforcement is

[47] Ibid., 186-187.

[48] Ibid., 152 and 187. For a fuller discussion, see ibid., 137-53.

[49] For example, ibid., 38 and 42.

[50] Ibid., 47.

often essential to the effectiveness of human rights, but such enforcement is not essential to their existence."[51]

About Capabilities: Nussbaum's Understanding of Human Capacity

Nussbaum puts forward an alternative to what she finds are standard conceptions of human rights. In her book *Creating Capabilities*, she maintains that her approach takes life in its multiplicity seriously. She does not believe that human life can be summed up using general, all-embracing categories.[52] Nussbaum seeks to include disabled people in her theory in a more explicit and inclusive way than Nickel does. Her starting point differs from Nickel's, who finds that certain "rights presuppose a greater degree of rationality and agency than some human beings possess". Persons who are severely intellectually impaired have, for example, the right to life and to due process, but not certain political rights, like a right to vote, nor freedom of movement on their own.[53] Nussbaum does not draw such distinctions and clearly does not want to afford 'rationality' the role it plays in some theories of justice as a basis for creating hierarchies between humans and between humans and non-human animals.[54] She

[51] Ibid., 187-88.

[52] Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, MA: 2011), 59.

[53] Nickel, *Making Sense of Human Rights*, 37.

[54] See e.g. Nussbaum, *Frontiers of Justice*, 159; "the capabilities approach sees the world as containing many different types of animal dignity, all of which deserve respect and even awe". See also e.g. Jeremy Waldron, *One Another's Equals: The Basis of Human Equality* (Cambridge, MA: 2017), 63-64, as well as c. 3, for a more comprehensive discussion of those capacities, "reason, moral agency, personal

clearly sees human dignity as a point of departure, whereas Nickel seeks to be more nuanced or agnostic on the question of a point of departure.

Still, like Nickel, Nussbaum endorses a minimal understanding of the social justice, which states need to protect via a constitutional framework. In several ways this understanding corresponds with international human rights norms, both with regard to their content and their role. The foundational notion in Nussbaum's theory of justice is the idea of so-called capabilities that are connected with the quality of life of human beings. The key question of her theory is: "What is each person able to do and to be?" 'Capabilities' provide the answers to this question. There are several of these capabilities, and they cannot be reduced to each other: they are qualitatively different.[55]

The capabilities are "a set of (usually interrelated) opportunities to choose and to act. In one standard formulation by [Amartya] Sen, 'a person's 'capability' refers to the alternative combinations of functionings that are feasible for her to achieve'". Accordingly, they have both an internal and an external dimension: "they are not just abilities residing inside a person but also the freedoms or opportunities created by a combination of personal abilities and the political, social, and economic environment".[56] Nussbaum therefore also talks of "combined capabilities", by which she means "internal capabilities plus the social/political/economic

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autonomy, and the capacity to love – that are supposed to underlie basic human equality and that might otherwise have dignity-conferring significance". Ibid., 217. See also ibid. c. 6 for a discussion of "profoundly disabled" persons that maintains their basic equality with differently abled human beings while upholding a distinction between human and non-human animals.

[55] Nussbaum, *Creating Capabilities*, 18.

[56] Ibid., 20-21.

conditions in which functioning can actually be chosen".[57] The internal capabilities comprise innate capabilities of intellectual and emotional kind, or personal traits. Mostly they develop through interaction with the environment: for example, through education and fostering. Importantly, both kinds of capabilities must be supported.[58]

Human beings need the different capabilities in order to lead a dignified life, which is a life where they are free to make choices and act as they see fit. The capabilities render possible a kind of substantial freedom. For sure, an individual can choose to act on her freedom in some sense, or refrain from doing so. For example, a person can have the capacity to vote but choose not to vote. Still, it may also be the case that a society is so unequal that such an act sooner is expressive of social submission and stigmatization. Thus, there exist external obstacles to the exercise of internal capabilities.[59] According to Nussbaum, we can shed light on and attend to different kinds of discrimination by including and underscoring both kinds of capabilities.

Nussbaum here repeatedly talks specifically about people with various kinds of disabilities. Like everyone else, these persons have the same right to attain the kind of substantial freedom necessary for there to be minimal social justice, even if this partly may or must happen via proxy.[60] Also, Nussbaum's focus on both internal and external obstacles resonates with how advocates of a 'social model of disability' emphasize both individual

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[57] Ibid., 22.

[58] Ibid., 21. She also talks of this in terms of "internal preparedness" and "external opportunity". Ibid., 61.

[59] Ibid., 61.

[60] See e.g. Nussbaum, *Frontiers of Justice*, 195-99. See also Kanter, *The Development of Disability Rights under International Law*, 16 and 266-68.

impairments and socially constructed obstacles in their understanding of what is 'disability', and the steps they believe that need to be undertaken to promote real inclusion of disabled persons.

While Nussbaum puts forward a kind of minimal theory of social justice, her focus is substantial justice for concrete persons in concrete contexts. The reason why she thinks that we can formulate a kind of overall theory at all is because people have many shared needs. She underlines that she is not here talking of man's "innate" nature as this would basically be a descriptive statement. Instead, she adopts from the start an ethical and evaluative stance.[61] The ten central capabilities which Nussbaum suggests that we need in order to lead "a life worthy of human dignity" are: life, bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; other species; play; and control over one's environment in a political and material sense.[62] Two of these, practical reason (to be able to plan one's own life) and affiliation (to be respected as a social being) appear as more foundational, or at least vital in the sense that if they are not to hand, a life where the other capabilities are present still falls short of a life worthy of human dignity.[63] The importance

[61] Nussbaum, *Creating Capabilities*, 28. See also Nussbaum, *Frontiers of Justice*, 181-82.

[62] Nussbaum, *Creating Capabilities*, 32-34. While the capabilities are 'central', Nussbaum concedes that the list is "open-ended and subject to ongoing revision". Martha C. Nussbaum, "Poverty and Human Functioning: Capabilities as Fundamental Entitlements," in *Poverty and Inequality*, eds. David B. Grusky and Ravi Kanbur (Stanford, CA: 2006), 47-75, 59.

[63] Nussbaum, *Creating Capabilities*, 39. However, see also Nussbaum, *Frontiers of Justice*, 85.

Nussbaum assigns to practical reason shows that she does not consider freedom to be only of instrumental value. Freedom, as the freedom to choose and to act, is also a goal in and of itself. A life worthy of human dignity is a life in which the human being is not only a passive recipient of different goods and services.[64]

Independent of our personal preferences or level of disability, these capabilities are basic for us all. Because her theory at heart is fairly minimal, Nussbaum takes it that people could, independent of their convictions, embrace it for "political purposes"; basically we are dealing here with a political doctrine.[65] Given that Nussbaum considers her theory as not relying on "metaphysical ideas",[66] about which we cannot reach agreement, she (like Nickel) also pays attention to the inescapable manifoldness of ideas and values as well as the widespread moral skepticism that characterizes our present age, in contrast to earlier times. That which falls outside of the foundational minimal social justice is the subject of politics, consensus and compromise. The idea of human dignity sets limits to that which can become the subject of politics. Something can be so vital that limiting freedom in this area makes life no longer worthy of human dignity,[67] and "respect for human dignity requires that citizens be placed above an ample (specified) threshold of capability, in all ten of those areas".[68]

According to Nussbaum, every state should safeguard these capabilities in its constitution. The interpretation of them can be contextual and take history and traditions into account. However, in contrast to what may be the case with material goods, Nussbaum

[64] Nussbaum, *Creating Capabilities*, 56.

[65] Ibid., 90 and 93.

[66] Ibid., 109. See further e.g. Nussbaum, "Poverty and Human Functioning," 60-68.

[67] Nussbaum, *Creating Capabilities*, 31.

[68] Ibid., 36. See also Nussbaum, *Frontiers of Justice*, 162.

maintains that political entitlements can never be ranked, as this would be contrary to justice and human dignity. We are dealing here with a partial theory of justice. Actual justice/equality sometimes demands more than what Nussbaum's minimal theory of social justice requires. The threshold should not be set too low, however. She wants to capture something that is desirable, and maintains that it is up to legislators and the courts to determine the level of aspiration as regards the degree of "capability security" that the constitution has to guarantee.[69]

Nussbaum on Human Rights

As noted above, Nussbaum maintains that her capabilities approach is connected to the human rights movement. In fact, she sees the theories of Sen and herself as human rights approaches. All human beings have certain core entitlements on account of their humanity. These must be respected. What Nussbaum seeks to capture by speaking of basic capabilities overlaps with regard to content with the human rights which international law acknowledges: they play a similar role as constitutional guarantees.[70] Rights expressing fundamental entitlements/capabilities function as "side constraints" on efforts to pursue "overall well-being", laying down "basic requirements of justice".[71]

Moreover, she believes that the capabilities approach can tackle some of the critique that has been directed at human rights. These have, for example, been criticized for not paying sufficient attention to "questions of gender, race and so on". Her approach would also complement standard approaches to human rights on a philosophical and theoretical plane. In

[69] Nussbaum, *Creating Capabilities*, 40-43.

[70] Ibid., 62-63. See also e.g. Nussbaum, "Poverty and Human Functioning," 52.

[71] Ibid., 56-57.

contrast to standard approaches, which choose to ground human rights in human beings' rationality or other characteristics, the capabilities approach takes its point of departure from "bare human birth" and "minimal agency".[72] Hereby it also becomes obvious why disabled people have the same human rights as everyone else.

Nussbaum further claims that her approach articulates in a clearer fashion the link between human dignity and human rights, between rights and duties, and between the entitlements of human beings and the entitlements of other species. She here adopts an idea that Nickel also embraces and elaborates along similar lines: that various actors may have obligations with regard to human rights, though, ultimately, states must secure the capabilities (and human rights). The duties that others can have are often moral rather than political in character.[73] Moreover, the duties can be both negative and positive. That is, it may be that the state must both abstain from acting in a particular fashion and also take certain active measures to support people's capabilities. In a way, fundamental rights remain empty words until state action makes them real.[74] Nussbaum makes a case for substantive equality, not only formal equality.[75]

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[72] Nussbaum, *Creating Capabilities*, 63.

[73] Ibid., 63-64 and 167. Cf. Nickel, *Making Sense of Human Rights*, 38-41. See also e.g. Slotte, *Human Rights, Morality, and Religion*, c. 2.1.2-2.1.6 and 2.3.2.

[74] Nussbaum, *Creating Capabilities*, 65. See also Nussbaum, "Poverty and Human Functioning," 53-55.

[75] For more about the meanings of formal equality and substantive equality, see e.g. Sandra Fredman, "Substantive Equality Revisited," *International Journal of Constitutional Law* 14 (2016), 712–38, who also refers to, e.g., Nussbaum's capabilities approach in the exploration of a meaningful multi-dimensional understanding of 'substantive equality' (ibid., 729-30). A

Finally, to Nussbaum, human rights are interrelated and presuppose each other.[76] This common idea in human rights theory is also found in Nickel.[77] Nussbaum seems to go further than Nickel in her insistence on social and economic rights, but she also partly discusses them in a less pragmatic fashion than Nickel. For she does not to the same extent connect the justification of the central entitlements to the question of whether or not they can be feasibly fulfilled.

The Importance of Rights Talk

While Nussbaum points out deficiencies in (standard approaches to) human rights, rights language occupies a central place in her capabilities approach. Like many other theorists, including Nickel, she points out that the rights talk carries weight compared to talk in terms of interests, for example. "It emphasizes the idea of a fundamental entitlement grounded in the notion of basic justice. It reminds us that people have justified and urgent claims to certain types of treatment, no matter what the world around them have done about that."[78]

Nussbaum sees rights talk as a way to get at asymmetric relations of power, and as seen above, in her theory of basic social justice this includes from the start, the explicit recognition and incorporation of persons with severe physical and cognitive disabilities. Her basic view

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key question guiding different conceptualisations is: "Equality of what?" Is it about "equality of treatment" or indeed more accurately about, e.g., "equality of results" or "equality of opportunity". Ibid., 720. Likewise, focus will linger more or less on questions of, e.g., the need for structural changes in order to attain *de facto* equality.

[76] Nussbaum, *Creating Capabilities*, 67.

[77] Nickel, *Making Sense of Human Rights*, 104

[78] Nussbaum, *Creating Capabilities*, 68.

of the human being and her concept of the person are inclusive. She underlines that physical and/or mental dependency is a fundamental part of every person's life, and at certain stages more extreme than during other times. She develops these ideas in explicit criticism of the "social contract tradition" and its ideas about contracting persons as free, independent "rough equals" able to 'fully cooperate', and who in essence design a contract that will regulate the lives of people who are like themselves. Because human life is not like that, such a postulate cannot serve as the basis for a theory of justice. "[P]ersons are from the start both capable and needy" and "subjects of justice", rather than – as an afterthought – recipients of compassion or charity. This is so, even if they are impaired from partaking in the actual conceptualization of so-called "primary goods" and in the choice of "basic political principles". Thus, Nussbaum identifies the perspectives of persons with cognitive and physical impairments, or indeed non-human animals or (persons of) poor nations, as a pivotal issue, not a marginal one, of any theory of justice. They are moved in from the 'margins' to which the social contract tradition in both its classic and modern forms has exiled them, to the extent that it has recognized them at all in some kind of derivative sense.[79] Throughout, she argues against

[79] Nussbaum, *Frontiers of Justice*, 14-18, 22, and 87-89; Nussbaum, "Poverty and Human Functioning," 69-75; Nussbaum, *Creating Capabilities*, 87 and 150. According to Nussbaum, "charity" or "compassion" has been the more immediate way of conceptualizing relationships, e.g., to the citizens of other (poorer) nations and to animals. To her mind, this approach is insufficient, and seeing something as "an occasion for charity" is not the same thing as identifying "a problem of justice". Nussbaum, *Frontiers of Justice*, 18-22. See also ibid., c. 2-3, where she also, e.g., criticizes social contract theories for fixating on income and wealth as "indices of well-being" and "relative social positions". Nussbaum, *Frontiers of Justice*, 164. See also

conflating ‘charity’ and ‘justice’ and sees rights as an important language for giving expression to the idea of equality.

What Nussbaum does not discuss is the way in which rights inescapably leave room for interpretation of what in a legal sense can justifiably be demanded in the name of human rights. In some sense, she does not sufficiently problematize the talk of rights. Here, her argumentation seems less developed than Nickel’s, who does recognize the vagueness and openness of (human) rights language, but finds that this fact does not single out the concept of human rights in relation to other normative concepts. Nor does he want to equate vagueness with emptiness. According to him, we can set limits to the use of a concept, and “[l]egal formulations of rights” can help us with this in the present case.[80]

Certainly, Nussbaum concedes that the idea of human rights is not crystal clear. Rights have been understood in different ways in different times and places. Rights language as such has tended to disguise this fact, offering an illusion of unity which does not exist on a philosophical plane, whether (for example) regarding their nature, their subject, or their ultimate foundation and thus the basis for the claims people make. (As a nod to Nickel and others, she also underlines that there exists no certainty regarding the relationship between rights and duties, whether a right always gives rise to a duty, and who the addressee is.) To Nussbaum, this is why rights language must be complemented by the language of capabilities, which can offer important specifications and additions. The capabilities approach takes a clear stand on these “disputed issues”, as the approach states “clearly what the

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e.g. Waldron, *One Another’s Equal*, 242-44, 247, for a discussion, including in relation to Nussbaum, about human life and functioning in general being marked throughout by various degrees of fragility.

[80] Nickel, *Making Sense of Human Rights*, 185.

motivating concerns are and what the goal is". In fact, she claims that the best way to think about fundamental rights is to think of them in terms of capabilities: "to secure a right of citizens in these areas [of, for example, free speech] is to put them in a position of capabilities to function in that area".[81]

In line with this, Nussbaum discusses judicial review as a way to provide the correct interpretation of the central 'entitlements', and she believes that her list of capabilities can be of help here, although (as she notes) "within limits set by constitutional text and precedent". They can also function as an incentive to constitutional changes and new legislation. At the same time, she underlines: "In all these areas deliberation operates. The only way in which the approach cuts off deliberation is that it urges that fundamental entitlements be secured beyond the whim of temporary majority preferences."[82]

Thus, Nussbaum holds that judicial review offers an opportunity to deepen and clarify the understanding of what we are dealing with. She underlines that, unfortunately, a judgment is not always a step forward. Yet she seems confident that her list of capabilities that lays down "minimum requirements for justice" will curb outright interpretative indeterminacy, including once they have become part of a constitutional framework.[83] However, next I will consider in some depth the way in which interpretation is inescapable, and raise a few issues that Nussbaum (and also in part Nickel) does not elaborate on. This is important as well

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[81] Nussbaum, "Poverty and Human Functioning," 52-53.

[82] Nussbaum, *Creating Capabilities*, 75.

[83] Ibid., 174-76; Nussbaum, *Frontiers of Justice*, 174-75. According to Nussbaum, the central entitlements are pre-political and, given that she sees her capabilities approach as a human rights approach, she also by this means refutes a position that sees human rights simply as "political artifacts". Ibid., 285-86.

since, according to Nussbaum, "one of the major avenues of implementation of the Central Capabilities is a nation's system of constitutional adjudication involving fundamental rights",[84] as well as the fact that she views her approach as a human rights approach.

Rights as Politics

Nussbaum rejects the idea that human rights are imperialist and have a western bias. To her, they are "the ally of the weak against the strong".[85] In the following, I base myself in part on authors who, on the contrary, are openly skeptical towards the potential of human rights to deal with injustices and who highlight their 'dark sides' (to refer to Julia McClure's essay in this volume).

According to Nussbaum, human rights (she mentions in this context the UDHR), in a similar way to her capabilities approach, "seeks an agreement for practical political purposes and deliberately avoids comment on the deep divisive issues".[86] In practice, however, one inescapably falls back on 'value' considerations of a more varied sort the minute one sets about adjudicating potential human rights violations. The sceptics urge us not to overlook this dimension. In order for an account of human rights to be viable, it has to grasp the way in which rights, just like charity, form part of politics. Certainly, human rights function as ideals, beyond and above politics and political compromise, and as a language in which to formulate normative claims when one might have neither positive law nor 'accepted morality' on one's side – an advantage of human rights vocabulary that we may want to

[84] Nussbaum, *Creating Capabilities*, 97.

[85] Ibid., 106. See also ibid., 102-05.

[86] Ibid., 109.

underline. Yet, even though rights do claim to stand outside 'politics' in this way, they are simultaneously within politics: they are conceptualized into being through political processes.

> Hence the extraordinary rhetorical power of rights: on the one hand: they are "outside" the political community in the sense that the legislator's task is merely to declare their presence in positive law, not to create them. On the other hand, they are also "inside" the community by being fixed in constitutions and other positive legal enactments and thus amenable to objective confirmation.[87]

Hence, "[r]ights not only determine and limit policies, but … policies are needed to give meaning, applicability, and limits to rights". Human rights are an outcome of politics, as we are dealing with processes "whereby an aspect of reality becomes characterized in terms of rights".[88] Moreover, politics is carried out by means of human rights.

As noted above, Nussbaum underscores the role of judicial review in reaching clarity and limiting interpretative discretion as to what rights we have. With regard to matters of human rights, the final say today also lies to great extent with judicial or semi-judicial human rights bodies. However, as Martti Koskenniemi underlines, legal reasoning here is a balancing act. Because of the general form of human rights, human rights law initially allows anyone to use them to make their case. Applying human rights law, however, means making "assessments of proportionality", evaluating and striking a balance between different interests and claims, and deciding in favor of one of at least two competing understandings of what has happened: that of the possible human rights victim and that of the possible violator. "There is no fixed point in law itself to which reference can be made in order to escape this

[87] Koskenniemi, "The Effect of Rights on Political Culture," 102.

[88] Ibid., 112. Cf. Nussbaum, *Frontiers of Justice*, 208-11.

dilemma", Koskenniemi argues. Legal norms will never be so determinate as to allow this.[89] Instead, inevitable discretionary assessments are made "by reference to some context or purpose" beyond law itself,[90] by having recourse to culturally and politically conditioned assumptions.[91] Law also explicitly accommodates this 'technically' by accompanying legal norms with qualifications, limitations and derogation clauses.

Thus, it is "never about realising rights that are 'out there', but always about whom we are to privilege, how scarce resources are to be allocated", and "then it becomes imperative to articulate criteria of distribution that underlie such choices"[92] and also to point out that these criteria are contested and that there are alternative visions of good.

Both Nickel and Nussbaum seek to highlight the political aspect of rights-talk as well, alongside seeing rights-talk as striving for an ideal. Today's societies are organized and ruled differently from earlier times. Human rights are attempts to hold those in political power to account who also, because of their position, are central to the workings of society and the well-being of humans.[93] Nickel also points out that human rights must be balanced against each other, but he does not develop these ideas in much depth. However, one can ask if the above-discussed theories fully manage to take the complex nature of human rights seriously,

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[89] Importantly, it is also not simply about semantic openness. Koskenniemi, "The Effect of Rights on Political Culture," 111.

[90] Martti Koskenniemi, "Human rights, politics and love," *Mennesker & rettigheter* 1 (2001), 33-45, 36; Koskenniemi, "The Effect of Rights on Political Culture," 99. They do not have any "essential or intrinsic meaning". Ibid., 107.

[91] Ibid., 108.

[92] Koskenniemi, "Human rights, politics and love," 41.

[93] See e.g. Nickel, *Making Sense of Human Rights*, 73.

or if they partly fail (perhaps Nickel more than Nussbaum), paradoxically because of how they rely on 'rights'. Critical legal scholars, like Koskenniemi, have pointed out certain limits that rights terminology puts on our imagination and perception of phenomena. Human rights is a greatly legalized discourse, conducted with reference to law.[94] 'Law', including the language of rights and human rights, is "a distinct manner of imagining the real" through language,[95] and this grammar will guide our vision.

This is why these scholars urge us to investigate the parameters within which justice and human life are conceptualized, and articulate the criteria of distribution underlying the choices that *de facto* are made in the act of applying human rights law: the current 'politics'. When they examine the current grammar of rights-talk, critics point out that we find, in effect, particular constructions of the self, sociability and specific modes of agency. These notions are "politically and culturally conditioned".[96] To quote Joseph Slaughter, who seems to partly echo Nussbaum's critical reading of the social contract tradition:

> International human rights law describes and promotes a universal, stable, unified, and knowable subject who has clearly delimited boundaries and interests. According to this conception of the individual, the subject knows what she wants, knows how to get it, and only human rights abuses stand in her way. More

[94] See also footnote 16 and Nickel's statement that human rights today are largely the rights of lawyers.

[95] Quote from Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology*, 3rd ed. (New York: 2000), 173.

[96] Quote from Koskenniemi, "The Effect of Rights on Political Culture," 108.

> explicitly, this subject is the hero of her own personal narrative of human dignity, enlightenment, and liberation.[97]

Slaughter continues:

> "the narrative of the pre-social and autonomous self, the heroic individual, who stands against the threat of society, and whose confrontation with society is to be assisted with the notion of rights is a misleading one." The notion of the "heroic individual" pits that individual against society without recognizing her as both a product of and a participant in that society.[98]

In relation to this legal human rights imagination, Frédéric Mégret has pointed out that:

> it may well be the very formulation and structure of rights which is the root cause of the exclusion of persons with disabilities. Indeed, I would contend that it is precisely the quasi-permanent dichotomies of human rights law that have marginalized disabled people and prevented them from fully enjoying their rights. The disabled individual's life experience—and his rights experience—is much more complex and interactional than that of persons without disabilities. As a

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[97] Joseph Slaughter, "A Question of Narration: The Voice in International Human Rights Law," *Human Rights Quarterly* 19 (1997), 406-30, 411. See also e.g. Frédéric Mégret, "The Disabilities Convention: Towards a Holistic Concept of Rights," *The International Journal of Human Rights* 12 (2008), 261-78, 262.

[98] Slaughter, "A Question of Narration," 411, quoting in part Adeno Addis, "Individualism, Communitarianism, and the Rights of Ethnic Minorities," *Notre Dame Law Review* 67 (1993), 615-76, 640. Cf. Mégret, "The Disabilities Convention: Towards a Holistic Concept of Rights," 262.

result, it is much less easy to disaggregate, and much more vulnerable to logics of rigid partitioning of rights.[99]

In consequence, the rights that are supposed to counteract marginalization and promote formal and substantial equality, that "aim at 'empowering the powerless' and 'giving voice to the voiceless'",[100] may actually still end up demanding a great deal of those in many ways fragile persons who want to make their claims heard. And while there may be groups ready to fight for the victims' cause, they may not have secured a seat at the tables where political decisions are ultimately made and matters of social policy settled.

Commentators have observed that the CRPD genuinely seeks to recognize the particular conditions of disabled people, what their needs are and what it takes to include and empower them. For reasons of wanting to remain as inclusive as possible, the treaty lacks an explicit definition of 'disability'. Yet its adoption was influenced by a social model of disability which, as noted above looks beyond individual impairments also to include socially constructed obstacles in the definition of 'disability'.[101] Arlene S. Kanter praises the treaty and calls attention to emerging civil society mobilization on its basis, yet is also mindful that crucial domestic implementation and real impact is still outstanding. Kanter states that the

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[99] Ibid., 263.

[100] James D. Ingram, "What Is a 'Right to Have Rights'? Three Images of the Politics of Human Rights," *American Political Science Review* 102 (2008), 401-16, 401; quoting Michael Ignatieff, "Human Rights as Idolatry," in *Human Rights as Politics and Idolatry*, ed. Amy Gutmann (Princeton, NJ: 2001), 53-98, 70.

[101] Schur , Kruse and Blanck, *People with Disabilities*, 3; Kanter, *The Development of Disability Rights under International Law*, 8, 46, and 49; Mégret, "The Disabilities Convention: Towards a Holistic Concept of Rights," 274.

CRPD views disability as an "evolving concept", and "offers new interpretations of well known international human rights terms such as dignity, autonomy, independence, security, and liberty". The treaty underscores the interdependence of rights, the need for a broad range of affirmative actions, for 'positive' rather than solely 'negative' state obligations, and the responsibility of other actors as well.[102] Likewise Mégret, in heightening similar aspects, remarks that the CRPD fruitfully "ignores" classical ideas and dichotomies of human rights law.[103] These observations regarding CRPD also echo points made by Nussbaum, for example, concerning what it takes to realize rights.[104]

Perhaps the CRPD can bring about real change. However, it is a task for further study to investigate whether it has affected the conceptualization of the human person more generally within human rights law.[105] In addition, it remains to be studied further if any revolutionary

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[102] Kanter, *The Development of Disability Rights under International Law*, 3, 8, 45, and 299-302. Kanter actually notes that domestic implementation of CRPD requires a "paradigm shift" on part of states towards disabled persons and their rights. Ibid., 298.

[103] Mégret, "The Disabilities Convention: Towards a Holistic Concept of Rights," 261-77; Frédéric Mégret, "The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?," *Human Rights Quarterly* 30 (2008), 494-516, 511-14.

[104] See Caroline Harnacke, "Disability and Capability: Exploring the Usefulness of Martha Nussbaum's Capabilities Approach for the UN Disability Rights Convention," *The Journal of Law, Medicine & Ethics* 41 (2013), 768-80, for an attempt to evaluate Nussbaum's approach specifically in relation to the CRPD.

[105] Cf. Mégret, "The Disabilities Convention: Towards a Holistic Concept of Rights," 274.

effect is cancelled out, or not, once the process of interpreting these rights in adjudication on the basis of the treaty begins for real, even if the CRPD seeks to 'close down' meaning and limit the space for such interpretations that would be detrimental to disabled persons.[106]

Concluding Remarks

Rights are conceptualized into being through political processes. Yet, human rights law has become a bearer of a narrative that in many ways conceals the political nature of human rights, transmitting instead an image of law as neutral and inclusive with regard to the variety of human needs. It seems that this weakens the argumentation of 'rights-based' approaches to counteracting marginalization. To some extent they will, despite everything, overestimate the power of 'rights'. So even if both Nussbaum and Nickel wish to put forward a theory that does not present an overly narrow image of the human being, reliance on 'rights-language' may undo some of what they are trying to achieve. Given that they are not as fixated on rights as the preferred, or even only, avenue forward, it may be that there are elements in the bottom-up, needs-based approaches of the kind propagated by Nussbaum that open more avenues for acknowledging the political nature of human rights. In addition, they may identify a more multi-layered and convincing picture of the human person and agency. As Koskenniemi has put it:

> the question is not so much which rights we have, or should have, but what it takes to develop politics in which deviating conceptions of the good – whether or not expressed in rights language – can be debated and realized without having to

[106] Mégret, "The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?," 504-07.

assume that they are taken seriously only if they can lay claim to an a-political absoluteness that is connoted by rights as trumps.[107]

Finally, given the limits to rights language, there might also still be reason to emphasize languages that describe the activities of helping and assisting, and languages which capture human vulnerability of various kinds, without assigning dubious moral qualities to them. These languages might offer constructive images that provide us with visions of what true inclusion could mean, and effect changes in mentality and attitudes in society. This is clearly something which Nussbaum wants to do by underlining dependency and the need of care as intrinsic features of human life.[108]

As the manual quoted at the beginning of this essay makes clear, depending on how we look at disability, and identify its causes (as a medical condition or biological impairment or as socially constructed barriers) the efforts to address patterns of exclusion will look different. The concept of 'normalcy' will play more or less of a problematic role,[109] as will reliance on 'individual agency' as the way 'forward'.

Human rights talk is about putting focus on vulnerability, suffering and injustice. Elsewhere, I have maintained, for example, that human rights could be conceptualized as an attempt to formulate the borders beyond which that which is considered 'human' turns

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[107] Koskenniemi, "The Effect of Rights on Political Culture," 116.

[108] See e.g. Nussbaum, "Poverty and Human Functioning," 68-75; Nussbaum, *Frontiers of Justice*, 412-15.

[109] National Commission Persons with Disability, *Rights, not charity*, 15-16. See also, e.g., Richard K. Scotch, "Disability as the Basis for a Social-Movement - Advocacy and the Politics of Definition," *Journal of Social Issues* 44 (1988), 159-72, 166; Schur, Kruse and Blanck, *People with Disabilities*, 96.

'inhuman'. There are limits to how a human being, who ever she is, may be treated and human rights talk is a way to highlight this. Human rights is also a language in which to frame resistance and emancipation.[110] As Nickel points out above, they can serve as a means for persons who seek to critique prevalent convictions and conditions in their societies – including existing legal arrangements - and invoke at least partly different standards of right and good.[111]

Hence, human rights can give voice to present-day experiences. At the center we find the human person, who is simultaneously fragile and irreplaceable. Yet, simultaneously we must be aware of the way in which language, including human rights language, can have both a transformative and a freezing effect on people's understanding of reality and agency. The outcomes of human rights are ambivalent.

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[110] For sure, these borders between humanity and inhumanity are not stable, and how they should be drawn is continously debated. For further exploration by the author of human rights talk, its benefits and limits, see e.g. Pamela Slotte, "Concluding Observations," *Finnish Yearbook of International Law* XVI (2006), 438-49; Miia Halme-Tuomisaari and Pamela Slotte, "Revisiting the Origins of Human Rights: Introduction", in *Revisiting the Origins of Human Rights*, ed. Pamela Slotte and Miia Halme-Tuomisaari (Cambridge: 2015), 1-36; as well as more comprehensively, Slotte, *Human Rights, Morality, and Religion.*

[111] See also, e.g., Freeman, *Human Rights*, 10: "If human rights were legally enforceable, one could, and normally would, appeal to one's legal rights, and would not have to appeal to one's human rights. One appeals to human rights precisely when legal institutions fail to recognize and enforce them." Moreover, human rights talk can also serve as a critique of how human rights *law*, human rights in their juridical form, more strictly speaking, is formulated and interpreted**.**

Bibliography

Addis, Adeno, "Individualism, Communitarianism, and the Rights of Ethnic Minorities," *Notre Dame Law Review* 67 (1993), 615-76.

Cohen, Ari, "The Problem of Secular Sacredness: Ronald Dworkin, Michael Perry, and Human Rights Foundationalism," *Journal of Human Rights* 5 (2006), 235-56.

Donnelly, Jack, *Universal Human Rights in Theory and Practice* (Ithaca, NY: 2003).

Feinberg, Joel and Jan Narveson, "The Nature and Value of Rights," *Journal of Value Inquiry* 4 (1970), 243-60.

Fredman, Sandra, "Substantive Equality Revisited," *International Journal of Constitutional Law* 14 (2016), 712–38.

Freeman, Michael, *Human Rights: An Interdisciplinary Approach* (Cambridge, Eng.: 2002).

Geertz, Clifford*, Local Knowledge: Further Essays in Interpretive Anthropology*, 3rd ed. (New York: 2000).

Griffin, James, *On Human Rights* (Oxford: 2008).

Halme-Tuomisaari, Miia and Slotte, Pamela "Revisiting the Origins of Human Rights: Introduction", in *Revisiting the Origins of Human Rights*, eds. Pamela Slotte and Miia Halme-Tuomisaari (Cambridge, 2015), 1-36.

Harnacke, Caroline, "Disability and Capability: Exploring the Usefulness of Martha Nussbaum's Capabilities Approach for the UN Disability Rights Convention," *The Journal of Law, Medicine & Ethics* 41 (2013), 768-80.

Hohfeld, Wesley N., *Fundamental Legal Conceptions as Applied in Judicial Reasoning, and Other Legal Essays*, ed. Walter W. Cook (New Haven: 1920).

Ignatieff, Michael, "Human Rights as Idolatry," in *Human Rights as Politics and Idolatry*, ed. Amy Gutmann (Princeton, NJ: 2001), 53-98.

Ingram, James D., "What Is a 'Right to Have Rights'? Three Images of the Politics of Human Rights," *American Political Science Review* 102 (2008), 401-16.

Jones, Charles, *Global Justice: Defending Cosmopolitanism* (Oxford: 2001).

Kanter, Arlene S., *The Development of Disability Rights under International Law: From Charity to Rights* (Abingdon: 2015).

Kennedy, David, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, NJ: 2004).

Koskenniemi, Martti, "The Effect of Rights on Political Culture," in *The European Union and Human Rights*, ed. Philip Alston (Oxford: 1999), 99-116.

Koskenniemi, Martti, "Human rights, politics and love," *Mennesker & rettigheter* 1 (2001), 33-45.

Koskenniemi, Martti, *The Politics of International Law* (Oxford: 2011).

Mégret, Frédéric, "The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?," *Human Rights Quarterly* 30 (2008), 494-516.

Mégret, Frédéric, "The Disabilities Convention: Towards a Holistic Concept of Rights," *The International Journal of Human Rights* 12 (2008), 261-78.

Mill, John Stuart, *Principles of Political Economy with some of their Applications to Social Philosophy* (London: 1881).

Monroe, Kristen Renwick, *The Heart of Altruism: Perceptions of a Common Humanity* (Princeton, NJ: 1996).

Nancy, Jean-Luc, "On Human Rights: Two Simple Remarks," in *The Meaning of Rights: The Philosophy and Social Theory of Human Rights*, eds. Costas Douzinas and Conor Gearty (Cambridge: 2014), 15-20.

National Commission Persons with Disability, *Rights, not charity: Guidelines towards an inclusive society and a positive difference in the lives of Maltese and Gozitan disabled*

people (Sta Venera: 2007).

Nickel, James W., *Making Sense of Human Rights*, 2nd ed. (Malden, MA: 2007).

Nussbaum, Martha C., *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, MA: 2006).

Nussbaum, Martha C., "Poverty and Human Functioning: Capabilities as Fundamental Entitlements," in *Poverty and Inequality*, eds. David B. Grusky and Ravi Kanbur (Stanford, CA: 2006), 47-75.

Nussbaum, Martha C., *Creating Capabilities: The Human Development Approach* (Cambridge, MA: 2011).

Perry, Michael J., *The Idea of Human Rights: Four Inquiries* (New York: 1998).

Schur, Lisa, Douglas Kruse, and Peter Blanck, *People with Disabilities: Sidelined or Mainstreamed?* (Cambridge, Eng.: 2013).

Scotch, Richard K., "Disability as the Basis for a Social-Movement - Advocacy and the Politics of Definition," *Journal of Social Issues* 44 (1988), 159-72.

Sennett, Richard, *Respect in a World of Inequality* (New York: 2003).

Shue, Henry, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton, NJ: 1996).

Slaughter, Joseph, "A Question of Narration: The Voice in International Human Rights Law," *Human Rights Quarterly* 19 (1997), 406-30.

Slotte, Pamela, "Concluding Observations," *Finnish Yearbook of International Law* XVI (2006), 438-49.

Slotte, Pamela*, Human Rights, Morality, and Religion: On Human Rigths as a Moral and Legal Concept in a Pluralistic World* [Mänskliga rättigheter, moral och religion: Om de mänskliga rättigheterna som moraliskt och juridiskt begrepp i en pluralistisk värld]*,* Doctoral dissertation (Turku: 2005).

Waldron, Jeremy, *One Another's Equals: The Basis of Human Equality* (Cambridge, MA: 2017).

Woodiwiss, Anthony, "The Law Cannot Be Enough: Human Rights and the Limits of Legalism," in *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law*, eds. Saladin Meckled-García and Başak Çali (London: 2006), 32-48, 36